Supreme Court, U.S.
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No. 99-1786

IN THE

Supreme Court of the United States

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, EARTH SYSTEMS, INC. and THE HEALTH AND WELFARE PLAN FOR EMPLOYEES AND DEPENDENTS OF EARTH SYSTEMS, INC.,

Petitioners,

v.

JANETTE KNUDSON and ERIC KNUDSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT JANETTE KNUDSON

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QUESTIONS PRESENTED

1. Whether an ERISA plan fiduciary may intervene or file a lien in state court to enforce its recoupment provision in order to avoid multiplicity of actions.

2. Whether an ERISA plan fiduciary seeking collection from its beneficiary under a recoupment (subrogation) provision in the plan may ignore timely notice of state court proceedings to determine the amount of money available for recoupment as well as for other lien-holders, and instead later bring a separate action against the beneficiary in federal court to relitigate the amount.

3. Whether a court may award attorney's fees under either ERISA or Fed. R. Civ. P. 11 when a party brings an action in district court, loses on the merits and then for the first time on appeal raises the issue of lack of subject matter jurisdiction.

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I. STATEMENT OF THE CASE

On June 3, 1993, Janette Knudson sued Hyundai Motors of America and others in Superior Court for the County of Los Angeles County, State of California ("Knudson I"). (Pet. 4.)[1] Petitioners Great-West Life & Annuity Insurance Company ("Great-West"), Earth Systems, Inc. ("Earth Systems), and the Health and Welfare Plan for Employees and Dependents of Earth System, Inc. ("the Plan," collectively referred to as "Petitioners") were notified of the lawsuit in 1993. At all times, Petitioners failed to file a lien or become a plaintiff-in-intervention although having statutory rights to do so under California law.

On March 26, 1997, Janette Knudson served Petitioners with a notice of an application for approval of a conditional settlement and for the establishment of a special needs trust and to satisfy the amounts of the liens by the healthcare providers.[2] (Resp. App. A-3a.) The application included the ERISA summary plan description which included the right to recovery provision. Respondent Janette Knudson requested an interpretation of the summary plan description to determine the amount of the lien owed to Great-West. (Pet. B-3) Petitioners did not file a lien, intervene or oppose the state court but instead removed the action to district court. (Pet. App. B-1.)

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1. "Pet." refers to the Petition for Writ of Certiorari. "Pet. App." refers to the Appendix, immediately following the text of the petition. "Resp. App." refers to Respondent Janette Knudson's Appendix attached hereto.

2. The parties stipulated that this application was properly served. The stipulation of facts between the parties is reproduced and attached as Appendix A.

On June 30, 1997, the district court remanded the action entitled, *Great-West Life and Annuity v. Janette Knudson, et al.*, Case No. CV 97-2801 JMI (JGx) ("Knudson II"), advising Great-West that the state court could fairly adjudicate Respondent Janette Knudson's lien obligations. (Resp. App. A-3a.)

On July 3, 1997, Respondent Janette Knudson served both Great-West and Earth Systems with the petition for an order to approve a conditional settlement agreement, order directing the net money to be paid to the Janette Knudson Special Needs Trust, Probate Code § 3611 and for an order approving settlement, including the disbursement for Medi-Cal and other disputed creditors with declarations by Janette Knudson and Jeffrey S. Pop.[3] (Resp. App. A-3a.) Along with this petition was the notice of hearing for July 23, 1997.

On July 8, 1997, Petitioners served Respondent Janette Knudson with its verified first amended complaint in this case, case no. CV 97-3745 JMI (JGx) ("Knudson III"), plus Petitioners' application for a temporary restraining order and other moving papers. (Resp. App. A-4a.)

On July 9, 1997, the district court denied the application for temporary restraining order.[4] (Resp. App. A-4a.) In its ruling, the district court stated:

> Further, Great-West has filed this [a]pplication after failing for three years to intervene in the state court action. Such a glaring omission raises a strong

3. The parties have stipulated that these documents were properly served.

4. The order denying the temporary restraining order is reproduced and attached as Appendix B.

> suspicion that Plaintiffs are forum shopping at the eleventh hour. (Resp. App. B-10a.)

On July 23, 1997, the court reviewed the ERISA plan, including the right to recovery language in the Plan and Great-West's lien claim of $411,152.11. The court evaluated the limited settlement funds in relation to the proportion of the past medicals recovered, the present value of future medical expenses, the past loss of earnings, and the present value of the future loss of earnings as well as the loss of enjoyment of life for the 35 year old, single mother who is quadriplegic and approved Great-West's lien of $13,828.70. (Resp. App. A-4a.) The court adjudicated the issues and compromised the medical lien, finding that the settlement was fair given the complex liability issues which caused Janette Knudson to accept a compromise settlement that only minimally compensated her for her catastrophic injuries. (Resp. App. A-4a.) The court authorized the Janette Knudson Special Needs Trust pursuant to California Probate Code § 3604.

Great-West again failed to file a lien, intervene, or to even appear to oppose the approval of the settlement and the establishment of the Janette Knudson Special Needs Trust and the determination of the medical lien amounts in light of the relatively small settlement.

On August 1, 1997, Janette Knudson served the order upon both Great-West and Earth Systems, trustee for the Plan. (Resp. App. A-5a.) Petitioners failed to appeal. Pursuant to the court order, Janette Knudson transmitted the funds to Great-West on August 21, 1997. (Resp. App. A-5a.) As ordered by the court, Defendant Hyundai directly funded the special needs trust. (Resp. App. A-5a.)

Thereafter, Great-West served its first amended complaint and the underlying district court litigation ensued. On May 14, 1998, after discovery and after numerous motions were argued, the district court granted Janette Knudson's cross-motion for summary judgment based upon its interpretation of the Plan's right to recovery language. (Pet. App. C-10.)

On May 20, 1998, the court entered the written order granting Janette Knudson's motion for summary judgment and statement of uncontroverted facts and conclusions of law. (Pet. App. C-10.) Thereafter, the district court denied Petitioners' motion for reconsideration and granted Janette Knudson's request for attorney fees. (Pet. App. D-1.)

On August 7, 1998, Great-West appealed the granting of summary judgment and request for attorney fees to the United States Court of Appeals for the Ninth Circuit.

On February 7, 2000, the Ninth Circuit Court of Appeals affirmed on different grounds in a non-published decision yet, indicating the appeal could be dismissed on the merits. (Pet. App. A-1.)

Petitioners filed for a petition for writ of certiorari in this Court on May 9, 2000. Janette Knudson now respectfully opposes the petition.

II. STATEMENT OF FACTS

This case involves a lien-holder, Great-West, who after three separate notices, twice by plaintiff and once by the district court, failed to intervene or appear in a state action to assert its lien rights but is now attempting to circumvent the state court's judgment which is now final, and the federal district court's concurrence with the state court's interpretation of the lien language.

Janette Knudson was driving a 1991 Hyundai on June 1992 when the car went off Interstate 5 at seventy (70) miles per hour and rolled over several times. (Pet. App. B-1.) She instantly became a quadriplegic. (Pet. App. A-2.) Janette Knudson is solely responsible for raising her nine (9) year old daughter, Jenna.

The Plan's Right to Recovery provision limited Great-West's lien to amount received for past medical treatment. (Pet. 5.) It states in pertinent parts:

> RIGHT OF RECOVERY. We will, at our sole option, have the right to recover from the covered person any payment for benefits paid for treatment of such loss under this booklet which the covered person is entitled to receive from a third party. We will have a first lien upon any recovery, whether by settlement, judgment or otherwise, the covered person receives from:
>
> > The third party; or the third party's insurer or guarantor; or the covered person's uninsured motorists insurance.

This lien will not exceed:

> the amount of benefits paid under this booklet for the treatment of a loss; or
>
> *the amount received by the covered person for such medical treatment from the third party*. . . . (Pet. 5 (emphasis added).)

Both the California state court *and* the district court interpreted this language in support of Janette Knudson's position that the lien amount was limited to the amount received for past medicals. Both courts ruled in Janette Knudson's favor based upon the merits of the case.[5] (Pet. App. C-10.) The district court held that a plan administrator cannot delete a provision of the Plan. (Pet. App. C-9.) Thus, when Great-West ignored the express limit on the recoverable lien, the court held that it acted arbitrarily and capriciously. (Pet. App. C-9.)

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5. During the district court proceedings, neither party mentioned the issue that is now framed by Great-West in this petition.

III. ARGUMENT

A. WHETHER AN ERISA PLAN FIDUCIARY MAY INTERVENE OR FILE A LIEN IN STATE COURT TO ENFORCE ITS RECOUPMENT PROVISION IN ORDER TO AVOID MULTIPLICITY OF ACTIONS.

B. WHETHER AN ERISA PLAN FIDUCIARY SEEKING COLLECTION FROM ITS BENEFICIARY UNDER A RECOUPMENT (SUBROGATION) PROVISION IN THE PLAN MAY IGNORE TIMELY NOTICE OF STATE COURT PROCEEDINGS TO DETERMINE THE AMOUNT OF MONEY AVAILABLE FOR RECOUPMENT AS WELL AS FOR OTHER LIEN-HOLDERS, AND INSTEAD LATER BRING A SEPARATE ACTION AGAINST THE BENEFICIARY IN FEDERAL COURT TO RELITIGATE THE AMOUNT.

This Court should not review the *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997), decision because it was not an issue in this case nor was it raised at the trial level; and it has no effect on this case because *Knudson* was decided on the merits.

This Court normally does not consider issues unless they have been presented to the courts below for decision. The failure to raise an issue in the courts below, absent extraordinary circumstances, precludes its consideration on appeal. *See Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990); *Yee v. Escondido*, 503 U.S. 519, 532-33 (1992). In pursuing its claim in district court, Great-West never mentioned *FMC Medical Plan v. Owens*, 122 F.3d 1258, but instead repeatedly asserted that the district court had jurisdiction.

1. There Was A Separate and Independent Basis For The District Court's Grant of Summary Judgment and the Ninth Circuit's Decision In Favor of Janette Knudson.

Summary judgment in favor of Janette Knudson was granted on the merits of the case. The Ninth Circuit noted that "in evaluating the substantive holding . . . requiring the dismissal of reimbursement claims for third party settlements under ERISA, the dismissal could be based either on lack of subject matter jurisdiction or on the *merits*."[6] (Pet. App. A-3 (emphasis added).)

Therefore, independent of the subject matter jurisdiction question, Great-West was not entitled to ignore the terms of the Plan which was properly interpreted by two trial courts.

The Petitioners are inferring that the district court in this case failed to accept subject matter jurisdiction over this ERISA case. They are wrong. The district court granted summary judgment in favor of Respondent Janette Knudson based upon the merits of her case and the interpretation of the ERISA health plan. The same interpretation argument was presented to and adopted by both the state court and district court. Janette Knudson argued that the district court had concurrent subject matter jurisdiction in the case.

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6. In footnote 5 of the Court of Appeals' Memorandum, the court makes reference to *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997). The proper reading of the footnote demonstrates that the Court of Appeals also considered the merits of this case in rending its decision in affirming the district court's decision.

2. *FMC* Is Not At Issue Nor Was It Raised.

As discussed above, Great-West never raised *FMC* during the district court proceedings. Great-West only raised *FMC* on appeal after it lost its case on the merits in district court. It is disingenuous for Great-West which filed the case in federal court and had its day in court to now attempt to avoid paying attorney fees for its miscalculations.

Apparently, since Petitioners have lost, they are now attempting to challenge the holding in *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997). This attempt is improper for a few reasons. First, the *FMC* case was never raised by Petitioners at the district court level.

Second, there are other cases before this Court which would may cleanly resolve this relatively "benign" issue. *See, e.g., Reynolds Metals Co. v. Ellis*, 202 F.3d 1246 (9th Cir. 2000), *petition for cert. filed*, 68 U.S.L.A. 3713 (U.S. May 10, 2000) (No. 99-1787); *Cement Masons Health and Welfare Trust Fund for Northern California v. Stone*, 197 F.3d 1003 (9th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3566 (U.S. Feb. 22, 2000) (No. 99-1403).

In *Reynolds*, 202 F.3d at 1247, and *Cement Masons*, 197 F.3d at 1005, the plan or its insurer filed in federal court seeking reimbursement for medical expenses which the plan or insurer had paid. Prior to the filing of the lawsuits, there had been no judicial determination of the amount of the recoverable lien. In those cases, the Respondent did not recognize the lien.

In the instant case, the state court determined the amount of the recoverable lien according to the principles set forth in ERISA. Great-West had standing to appear at the state court hearing and was repeatedly urged to attend. It chose not to participate. The language of the Plan limited the amount of recovery.

In *Reynolds*, 202 F.3d at 1248, and *Cement Masons*, 197 F.3d at 1006-09, the plan participants defended against the claim for reimbursement by asserting *FMC* against the Plan/ insurers' federal court claim for reimbursement.

Janette Knudson has never asserted the lack of subject matter jurisdiction issue. In this case, on appeal, but not raised below, Petitioners for the first time asserted *FMC* against itself in order to avoid the imposition of attorney fees. The appellate decision affirmed the granting of summary judgment on separate and independent grounds for which the trial court granted summary judgment, but noted that this case was summarily resolved based upon the merits.

Unlike *Reynolds* and *Cement Masons*, Janette Knudson acknowledged and recognized the Plan's right to recovery. Janette Knudson paid Great-West pursuant to a court order. In this case, the alleged fiduciaries had ample opportunities to intervene in a state action *before* an adjudication of the amount of liens, but failed to do so.

Third, even assuming that somehow this issue merits review by this Court, the outcome in Janette Knudson's case remains unchanged because both the state and federal court found in her favor based upon the merits of her case and the interpretation of the language of the Plan which limited recovery to the amount of past medical expenses received from a tortfeasor.

C. WHETHER A COURT MAY AWARD ATTORNEY'S FEES UNDER EITHER ERISA OR FED. R. CIV. P. 11 WHEN A PARTY BRINGS AN ACTION IN DISTRICT COURT, LOSES ON THE MERITS AND THEN FOR THE FIRST TIME ON APPEAL RAISES THE ISSUE OF LACK OF SUBJECT MATTER JURISDICTION.

It is within the court's discretion to award attorney's fees. *See* 29 U.S.C. § 1132(g)(1). Great-West has not argued that the district court abused its discretion under ERISA, and thus, there is no basis to reverse or modify the award of attorney's fees.

In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 409 (1990), this Court held that district courts retain jurisdiction to award attorney's fees pursuant to Fed. R. Civ. P. 11 after a voluntary dismissal of the suit. This Court stated:

> It is well established that a federal court may consider collateral issues after an action is no longer pending. For example, district courts may award costs after an action is dismissed for want of jurisdiction. *See* 28 U.S.C. § 1919. This Court has indicated that motions for costs or attorney's fees are "independent proceedings supplemental to the original proceeding and not a request for a modification of the original decree." *Sprague v. Ticonic National Bank*, 307 U.S. 161, 170 (1939). Thus, even "years after the entry of a judgment on the merits" a federal court could consider an award of counsel fees. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451, n.13 (1982). A criminal contempt charge is

likewise " 'a separate and independent proceeding at law' " that is not part of the original action. *Bray v. United States*, 423 U.S. 73, 75 (1975), *quoting Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 445 (1911). A court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated. *See United States v. Mine Workers*, 330 U.S. 258, 294 (1947) ("Violations of an order are punishable as criminal contempt even though . . . the basic action has become moot"); *Gompers v. Bucks Stove & Range Co.*, *supra*, 451 (when main case was settled, action became moot, "of course without prejudice to the power and right of the court to punish for contempt by proper proceedings"). Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated.

Id. at 395-96. *See also Willy v. Coastal Corp.*, 503 U.S. 131, 134-35 (1992) (award of attorney's fees pursuant to Rule 11 permissible following an improper removal and remand); *White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445, 451-52 (1982) (award of attorney's fees under 42 U.S.C. § 1988 is collateral to decision on the merits, and thus not subject to the 10-day limitation of a motion to amend or alter a judgment); *Moore v. Permanente Med. Group, Inc.*,

981 F.2d 443, 445 (9th Cir. 1992) (district court has power to award attorneys fees even in the absence of subject matter jurisdiction).

Therefore, the question of attorney's fees is well settled and does not need to be reviewed by this Court.

CONCLUSION

For the foregoing reasons, Respondent Janette Knudson respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — STIPULATION OF FACTS BETWEEN THE PARTIES DATED FEBRUARY 9, 1998

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Appendix A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV-97-3745 JMI (Jgx)

STIPULATION OF FACTS BETWEEN THE PARTIES

(Judge James M. Ideman)

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC. AND EARTH SYSTEMS, INC., THE PLAN ADMINISTRATOR FOR THE HEALTH AND WELFARE PLAN FOR EMPLOYEES OF EARTH SYSTEMS, INC.

Plaintiffs,

v.

JANETTE KNUDSON, an individual; ERIC KNUDSON, an individual

Defendants.

Thomas H. Lawrence, Esquire on behalf of GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, THE HEALTH AND WELFARE PLAN FOR EMPLOYERS OF EARTH SYSTEMS, INC. AND EARTH SYSTEMS, INC., THE PLAN ADMINISTRATOR FOR THE HEALTH AND WELFARE PLAN FOR EMPLOYERS OF EARTH SYSTEMS, INC., Plaintiffs and Jeffrey S. Pop, Esquire on behalf of JANETTE KNUDSON, Defendant, hereby stipulate to the following facts which are *not* disputed:

Appendix A

1. On March 26, 1997, Jeffrey S. Pop, on behalf of Janette Knudson, sent by mail a document entitled "NOTICE OF MOTION AND MOTION TO APPROVE SETTLEMENT AND PETITION FOR ORDER DIRECTING THE NET MONEY TO BE PAID TO THE JANETTE KNUDSON SPECIAL NEEDS TRUST (*PROBATE CODE* § 3611) AND FOR ORDER APPROVING SETTLEMENT INCLUDING DISBURSEMENT FOR MEDICAL AND OTHER DISPUTED CREDITORS; DECLARATION OF JANETTE KNUDSON AND JEFFREY S. POP ATTACHED HERETO; POINTS AND AUTHORITIES; EXHIBIT 11; AND [PROPOSED] ORDER FILED SEPARATELY AND CONCURRENTLY HEREWITH". The foregoing document was received by mail and/or Express Mail by Great-West Life & Annuity Insurance Company ("Great West"). The Notice of Motion stated that the hearing date for the Motion was April 23, 1997 in Superior Court;

2. On April 22, 1997, Great-West filed a Notice of Filing Notice of Removal in State Court and a Notice of Removal in Federal Court and thereby removed the action to Federal District Court in Case No. CV 97-2801-JMI (Anx);

3. On June 30, 1997, the Order granting Plaintiff's Motion to Remand and Order Remanding Action to Superior Court was filed by the United States District Judge, James M. Ideman;

4. On July 3, 1997, Plaintiff Janette Knudson re-noticed and filed in Superior Court, Case No. LC 022329 a "NOTICE OF MOTION AND MOTION TO APPROVE SETTLEMENT AND PETITION FOR ORDER DIRECTING THE NET

MONEY TO BE PAID TO THE JANETTE KNUDSON SPECIAL NEEDS TRUST (*PROBATE COURT* § 3611) AND FOR ORDER APPROVING SETTLEMENT INCLUDING DISBURSEMENT FOR MEDICAL AND OTHER DISPUTED CREDITORS; POINTS AND AUTHORITIES IN SUPPORT THEREIN; DECLARATION OF JEFFREY S. POP IN SUPPORT THEREOF." The Notice of Motion stated that the hearing date was July 23, 1997. The foregoing documents were mailed to, and received by, both Great-West and Earth Systems, Inc.

5. On or about July 8, 1997, Great-West Life and Earth Systems, Inc., Plaintiffs, made an Ex Parte Application for Temporary Restraining Order in Case No. CV 97-3745 JMI (Jgx) and served the Verified First Amended Complaint on Janette Knudson and her attorney, Jeffrey S. Pop, along with the Ex Parte Application for Temporary Restraining Order;

6. On July 9, 1997, James M. Ideman, United States District Judge, issued an Order denying Plaintiff's Ex Parte Application for Temporary Restraining Order in Case No. 97-3745 JMI (Jgx);

7. On July 23, 1997, Judge Farrell issued an ORDER APPROVING SETTLEMENT AND PETITION DIRECTING THE NET MONIES TO BE PAID TO THE JANETTE KNUDSON SPECIAL NEEDS TRUST (*PROBATE CODE* § 3611) AND FOR ORDER APPROVING SETTLEMENT INCLUDING DISBURSEMENT FOR MEDICAL AND OTHER DISPUTED CREDITORS;

8. On August 1, 1997, the ORDER APPROVING THE SETTLEMENT AND THE ESTABLISHMENT OF THE JANETTE KNUDSON SPECIAL NEEDS TRUST was mailed to, and received by, both Earth Systems, Inc. and attorneys for Great-West.

9. On August 21, 1997, by letter to Great-West, Assistant Recovery Manager, Louis A. Tuccitto, Pop issued a client's trust check in the amount of Thirteen Thousand Eight Hundred Twenty-Eight Dollars and Seventy Cents ($13,828.70) to Great-West. A carbon copy of the letter was sent to and received by counsel for Plaintiffs.

10. On August 22, 1997, Attorney Lawrence faxed to Attorney Pop a letter notifying him that all funds should be segregated pending the outcome of the Federal Court case.

11. On August 22, 1997, Attorney Pop faxed and mailed a letter to Attorney Lawrence informing him that the monies Attorney Pop received had been disbursed and the Special Needs Trust was funded directly from Hyundai.

The foregoing facts as to the timing of events are undisputed and hereby stipulated to by the parties.

Dated: February 9, 1998

JEFFREY S. POP & ASSOCIATES

By */s/* _____
Jeffrey S. Pop, Esq.
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Appendix A

Dated: February 9, 1998

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By */s/* _____
Thomas H. Lawrence, Esq.
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GREAT-WEST LIFE & ANNUITY
INSURANCE COMPANY, ET AL.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DENYING PLAINTIFFS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER DATED JULY 9, 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV-97-3745 JMI (JGx)

GREAT-WEST LIFE & ANNUITY
INSURANCE COMPANY, et al.,

Plaintiffs,

v.

JANETTE KNUDSON, et al.,

Defendants.

ORDER DENYING PLAINTIFFS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER

IT IS HEREBY ORDERED:

This Court is in receipt of Plaintiffs' *ex parte* Application for a Temporary Restraining Order. This Court is also in receipt of Defendants' Oppositions. After careful review, considering all the arguments and materials presented by the parties, the Application is hereby DENIED.

Appendix B

BACKGROUND

This action arises under the Employee Retirement Income Security Act of 1974 ("E.R.I.S.A."), codified at 29 U.S.C. § 1001, *et seq.* Plaintiff Great-West Life & Annuity Insurance Company ("Great-West") is the assignee for collection of the health and welfare plan for employees of Earth Systems, Inc. ("Earth Systems"). Defendants are Janette and Eric Knudson, husband and wife. Mr. Knudson was an employee of Earth Systems when he and his wife were involved in an automobile accident which left Mrs. Knudson a quadriplegic for life.

Defendants in 1993 sued Hyundai Motors of America, and others, in Los Angeles Superior Court. Though Plaintiff Great-West was the assignee with rights of subrogation on an E.R.I.S.A. funded policy, it did not until recently seek to intervene in that action. Instead, when the Knudsons and Hyundai agreed on a $650,000.00 settlement, Great-West removed that case to federal court (*Knudson, et al. v. Hyundai Motors of America, Inc., et al.*, CV 97-2801 (JMI (ANx)). This Court recently remanded that case because Great-West, a non-party in that action, had no right to remove the case to federal court.

At about the same time, Plaintiffs filed the instant action. They have now applied for a Temporary Restraining Order, asking this Court to enjoin the state court from approving the settlement agreement and enjoining Defendants from receiving any settlement funds. Plaintiff Great-West alleges that it is entitled to $411,157.11 of the settlement proceeds because it paid out that amount in plan benefits to pay for

Appendix B

Defendants' medical expenses. Because the E.R.I.S.A. plan provided for first-lien reimbursement of medical expenses recovered from third parties, Plaintiff Great-West argues that it is entitled to injunctive relief.

ANALYSIS

Interlocutory injunctive relief is appropriate if the moving party can show either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions exist on the merits and the balance of hardships tips sharply in its favor. *Associated Gen. Contractors of Cal. v. Coalition for Economic Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991). Alternatively, a court may issue an injunction if it finds: (1) a strong likelihood of success on the merits; (2) a possibility of irreparable injury to the moving party; (3) that the balance of hardships favors the moving party; and (4) in certain cases, that the public interest favors injunctive relief. *Johnson v. California State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995).

In this case, injunctive relief is not appropriate. It is well settled that a federal court may not enjoin a state court proceeding "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. This rule codifies the general rule of restraint in cases such as this, where an unnecessary injunction against a separate sovereign promises to disrupt the delicate balance of federalism. In this case, Plaintiffs have made no showing that there exists any of the three narrow exceptions mandated by statute. For that reason alone, the Application must fail.

Appendix B

Also, it appears that Plaintiff is not likely to succeed on the merits. The settlement agreement, which promises to provide $650,000.00 to the Knudsons, allocates damages as follows:

Loss of Earnings	5%
Past Medical Expense	5%
Future Medical Expenses	45%
Loss of Enjoyment of Life; Distress; Long-Term Disability	40%
Other	5%

Because past medical expenses reflect only five per cent of the proposed settlement amount, it does not appear that Plaintiff Great-West will be entitled to full subrogation. Rather, it appears that Great-West will ultimately recover far less than the amount it seeks here.

Two more reasons support denial of Plaintiffs' Application. Plaintiffs have not alleged irreparable harm, as their rights of subrogation remain intact, leaving them an adequate legal remedy to recover what they are rightly due once the settlement is paid. Further, Great-West has filed this Application after failing for three years to intervene in the state court action. Such a glaring omission raises a strong suspicion that Plaintiffs are forum shopping at the eleventh hour.

Appendix B

CONCLUSION

Accordingly, Plaintiff's Application is hereby DENIED.

IT IS SO ORDERED.

DATED: July 9, 1997

/s/ _____
James M. Ideman
United States District Judge